



FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

The Committee solicits comment on the following proposals by March 1, 2016. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee proposes amended instructions where a defendant has been charged with delivery or possession of controlled substances under MCL 333.7401 and MCL 333.7403: M Crim JI 12.2 and 12.5, respectively. Language was eliminated that suggested that the prosecutor had to prove that the defendant knew that he or she delivered or possessed the specific controlled substance that he or she actually delivered or possessed. Further, the instructions were reformed to eliminate repetitive language. Deletions are in strikethrough; additions are underlined.

[AMENDED] M Crim JI 12.2 Unlawful Delivery of a Controlled Substance

(1) The defendant is charged with the crime of illegally delivering [(state weight) of a mixture containing]¹ ~~a~~ the controlled substance, _____. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant delivered ~~a controlled substance~~ [identify controlled substance].

(3) Second, that the ~~substance delivered was~~ _____.

~~(4) Third, that the defendant knew that [he / she] was delivering~~ _____
delivered a controlled substance.

~~{(54) Fourth~~ Third, that the controlled substance that the defendant delivered [was in a mixture that] weighed (state weight).]¹

~~[(65) Fifth~~ Fourth, that the defendant was not legally authorized to deliver this substance.]]²

~~(76)~~ “Delivery” means that the defendant transferred or attempted to transfer the substance to another person, knowing that it was ~~[state substance]~~ a controlled substance and intending to transfer it to that person. [An attempt has two elements. First, the defendant must have intended to deliver the substance to someone else. Second, the defendant must have taken some action toward delivering the substance, but failed to complete the delivery. It is

not enough to prove that the defendant made preparations for delivering the substance. Things like planning the crime or arranging how it will be committed are just preparations; they do not qualify as an attempt. In order to qualify as an attempt, the action must go beyond mere preparation, to the point where the crime would have been completed if it hadn't been interrupted by outside circumstances. To qualify as an attempt, the act must clearly and directly be related to the crime the defendant is charged with attempting and not some other goal.]]³

Use Note

Because the statutory definition of delivery includes actual, constructive, or attempted transfer of a substance, attempted delivery is not a lesser included offense. MCL 333.7105(1).

¹ This bracketed material should be given where the controlled substance is a narcotic drug classified in Schedule 1 or 2, or a cocaine-related substance as found in MCL 333.7214(a)(iv).

² This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to possess the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278, 523 NW2d 325 (1994).

³ Use bracketed material defining attempt only in cases involving act falling short of completed delivery. Any attempt is a specific intent crime. *People v Joeseype Johnson*, 407 Mich 196, 239, 284 NW2d 718 (1979) (opinion of Levin, J.).

A prosecutor need not prove that the defendant intended to possess any particular controlled substance, only that he or she intended to possess some controlled substance. See *McFadden v United States*, 576 US ____; 135 S Ct 2298; 192 L Ed 2d 260 (2015).

[AMENDED] M Crim JI 12.5 Unlawful Possession of a Controlled Substance

(1) The defendant is charged with the crime of knowingly or intentionally possessing [(state weight) of a mixture containing]¹ a the controlled substance, _____. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant possessed² ~~a controlled substance~~ [identify controlled substance].

(3) Second, that the ~~substance possessed was~~ _____.

(4) ~~Third, that the defendant knew that [he / she] was possessing [list substance]~~ possessed a controlled substance.

~~[(5) Fourth~~ Third, that the substance that the defendant possessed was in a mixture that weighed (state weight).]¹

[(65) ~~Fifth~~ Third / Fourth], that the substance was not obtained by a valid prescription given to the defendant.]³

[(76) ~~Sixth~~ Third / Fourth], that the defendant was not otherwise authorized to possess this substance.]⁴

Use Note

¹ This bracketed material should be given where the controlled substance is a narcotic drug classified in Schedule 1 or 2, or a cocaine-related substance as found in MCL 333.7214(a)(iv).

² For a definition of possession, see M Crim JI 12.7.

³ This paragraph should be given only if some evidence has been presented that the defendant had a valid prescription for the substance. See *People v Little*, 87 Mich App 50, 54-55, 273 NW2d 583 (1978), and Use Note 4 below.

⁴ This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to possess the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278, 523 NW2d 325 (1994).

A prosecutor need not prove that the defendant intended to possess any particular controlled substance, only that he or she intended to possess some controlled substance. See *McFadden v United States*, 576 US ____; 135 S Ct 2298; 192 L Ed 2d 260 (2015).